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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Adoption of S.M., a Minor.	B292369
M.S., Plaintiff and Respondent, v. K.M., Defendant and Appellant; S.M., a Minor, Respondent.	(Los Angeles County Super. Ct. No. BT060440)

APPEAL from an order of the Superior Court of Los Angeles County, Margaret Henry. Affirmed.

Robert Walmsley, under appointment by the Court of Appeal, for Defendant and Appellant K.M.

Andre Toscano, under appointment by the Court of Appeal, for Plaintiff and Respondent M.S.

Janette Cochran, under appointment by the Court of Appeal, for Respondent S.M., a Minor.

Appellant K.M. (appellant) appeals from the trial court's order, terminating his parental rights to his daughter S.M. (born in 2008) under Family Code section 7822[1] based on a finding he abandoned her, and freeing S.M. for adoption by her stepfather, M.S. (stepfather). On appeal, appellant contends that the order must be reversed because the section 7851 investigative report submitted in support of the order was inadequate, and insufficient evidence supported the juvenile court's finding of abandonment. As we explain, appellant has failed to demonstrate reversible error, and consequently, we affirm.

FACTUAL AND PROCEDURAL HISTORY

This matter concerns: (1) S.M.; (2) her mother, S.S.[2] (the mother); (3) appellant; and (4) stepfather, who filed a petition to declare S.M. free from parental custody and control of appellant and to terminate appellant's parental rights.

The evidence presented at the trial on the petition disclosed that the mother and appellant met in high school and dated until they graduated. By April 2008, however, when the mother discovered she was pregnant with S.M., she and appellant were in an "on and off" relationship, and she lived with her parents. (Capitalization omitted.) Shortly thereafter, the mother ended her relationship with appellant because of his habitual absence, criminal street gang lifestyle and lack of financial support. Although appellant was present at the hospital when S.M. was born in October 2008, from her birth until the end of 2008,

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[1] Unless otherwise indicated, all statutory references are to the Family Code.

[2] The mother has sole physical and legal custody of S.M and is not a party to the appeal; S.M. and her stepfather M.S. are respondents.

appellant had only three brief visits with the baby. And even though he was employed at the time, according to the mother, appellant claimed he did not have enough money to provide support for S.M.

Appellant had short visits with the baby about once per month until March 2009 but provided no financial support. In March 2009, appellant was arrested and charged with second degree robbery. He was convicted, and in July 2009 he was sentenced to three years in prison. For the first few months while he was incarcerated, appellant spoke to the mother by telephone a few times and wrote three letters to S.M. From October 2009 until his release in late 2011, however, appellant had no contact with S.M. and provided no financial support.

In early 2010, the mother met stepfather, and in October 2010 they married, and the mother, stepfather, and S.M. began living together as a family. In April 2011, the mother sought and was granted sole legal and physical custody of S.M.[3] Appellant was released from prison in November 2011, and he had one visit with S.M. in December 2011.

Appellant visited S.M. once a month in January, February, and March 2012 for about 30 minutes at a time. In March 2012, the court ordered appellant to pay $269 per month in child support. Appellant, however, paid no support and had no further contact with S.M. until the fall of 2012. From September 2012 through May 2013, appellant paid the monthly support and visited with S.M. several times. Between May 2013 and March 2014, appellant had only two visits with his daughter.

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[3] The 2011 custody order required that appellant seek a court order to have visits with S.M.

In March 2014, appellant filed a request in the family law court for an order granting him visitation, including overnight visits with S.M. As a result of mediating the request, in June 2014, the mother and appellant agreed to a "step-up" visitation plan, starting with supervised visits.[4] Appellant complied with the visitation agreement for four months but stopped visiting in September 2014. Between December 2014 until June 2015, according to the mother, appellant had no contact with her or S.M.

In mid-2015 appellant was arrested and taken into federal custody for the importation of methamphetamine and heroin into the United States; he pleaded guilty and was sentenced to 70 months in federal prison.

In July 2015, stepfather filed a petition to adopt S.M. On February 29, 2016, the Los Angeles County Department of Children and Family Services (DCFS) filed a report addressing S.M.'s adoption by stepfather. Among other things, the report recommended the adoption[5] and also disclosed that S.M. was aware of and was in favor of the adoption.

On January 31, 2017, stepfather filed a petition based on sections 7822 and 8604 to declare S.M. free from parental custody and control and to terminate appellant's parental rights as to S.M.

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[4] In June 2014, they signed a conciliation court agreement, containing: step one, three-hour visits on the second and fourth Saturday and Sunday, with maternal grandmother as a comfort person; step two, after 12 consecutive visits, the same three-hour visit schedule but without a comfort person; step three, after six consecutive visits under step two, six-hour visits. They agreed to return to mediation in November 2014 to plan the next steps in the parenting plan.

[5] In March 2016, the mother obtained a family law judgment, ordering legal and physical custody of S.M. to her and no visits for appellant.

The petition alleged that between January 2009 to January 2017 appellant had virtually no contact with S.M. and had provided only token support. The petition alleged it was in the child's best interest to free her from appellant's parental custody and control.

On November 2, 2017, the probation/investigative officer filed a report prepared under section 7851. In the report, the investigator recommended that the court grant stepfather's petition. The probation officer's report disclosed that the mother and stepfather had been interviewed[6] and it noted S.M. was a happy, healthy and intelligent girl, who had a father-daughter relationship with stepfather.

Appellant opposed the petition, and the court conducted a trial, during which the mother, stepfather, and appellant testified.[7] During her testimony, the mother related the details of her relationship with appellant and his inconsistent involvement and visitation with S.M. since her birth. The mother also confirmed that appellant had made a total of 10 child support payments through child support services from September 2012 to April 2015 totaling $1,977.73, and three other separate payments made directly to her: In June 2014, he paid $150; in July 2014, he paid about $200; and in August 2014, he paid about $275. The mother also testified that appellant occasionally brought gifts to S.M. She stated appellant never asked about S.M. nor participated in school functions or attended any of the child's medical appointments.

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[6] The probation officer's report noted that the interviewing officer did not have information about appellant's whereabouts, so the probation officer did not obtain a statement from him.

[7] Because he could not be brought from federal prison to participate in person, appellant appeared and testified via video conference from prison.

Appellant testified that he opposed the termination of his parental rights because he loved his daughter and wanted to have a relationship with her when he was released from prison in 2020. He testified that he participated in S.M.'s life as much as he could when he was not in prison and that when he was in prison, he wrote her letters. Appellant testified that the mother limited his ability to visit and thus his visitation was "off and on." (Capitalization omitted.) Appellant did not remember exactly how many visits he had with his daughter between his release from custody in late 2011 and when he was reincarcerated in 2015. He confirmed he had no contact or visits with S.M. after June 2015, but claimed that he wrote multiple letters to her and he received no response. After 2015, he did not contact S.M. because he did not want to create problems for the family. Concerning financial support, appellant claimed that he provided a few hundred dollars per month to the mother whenever he could, except when he was incarcerated.

Stepfather also testified during the trial. He told the court that he and the mother were responsible for providing S.M. with necessities and that he actively participated in all of S.M.'s educational and medical needs since she was two years old. He believed he and S.M. had a father-daughter relationship.

Stepfather's attorney asked the court to terminate appellant's parental rights because appellant had abandoned S.M. S.M.'s counsel agreed, and argued that termination of parental rights and adoption was in the best interest of the child. S.M.'s counsel stated he observed the interaction between S.M. and stepfather in their home, and believed that stepfather filled a parental role for S.M. Appellant's counsel requested that the court consider guardianship rather than terminate appellant's parental rights.

The court found that appellant had been absent "in every sense of the word" from S.M.'s life, that the statutory requirement

of abandonment had been met under section 7822, and that it was in S.M.'s best interest to have appellant's parental rights terminated so stepfather could adopt her. To the extent the testimony of the mother and appellant conflicted, the court observed that the mother had "more specifics and was more credible." The court also stated that it had considered the investigative report and the DCFS report.

Appellant timely filed a notice of appeal.

DISCUSSION

A. *Appellant Has Not Demonstrated that the Deficiencies in the Investigative Report Resulted in Prejudicial Error*

Appellant contends that this court should reverse the trial court's order terminating his parental rights because the section 7851 investigative report submitted in support of the petition was inadequate. As we shall explain, appellant failed to object to the report in the trial court, and thus, he forfeits any complaint about it here. And even if he had preserved the claim, given the other evidence presented at trial, any error is harmless.

Section 7851 requires an investigative report when a stepparent seeks to free a child from the custody and control of a biological parent. The investigator must provide "to the court a written report of the investigation with a recommendation of the proper disposition to be made in the proceeding in the best interest of the child." (§ 7851, subd. (a).) The report is required to include the following information regarding the child: "(1) [a] statement that the person making the report explained to the child the nature of the proceeding to end parental custody and control[;] [¶] (2) [a] statement of the child's feelings and thoughts concerning the pending proceeding[;] [¶] (3) [a] statement of the child's attitude

towards the child's parent or parents and particularly whether or not the child would prefer living with his or her parent or parents[; and] [¶] (4) [a] statement that the child was informed of the child's right to attend the hearing on the petition and the child's feelings concerning attending the hearing." (§ 7851, subd. (b).) This section requires the court to "receive the report in evidence" and to "read and consider its contents in rendering the court's judgment." (§ 7851, subd. (d).)

The investigator's report here did not comply with section 7851, subdivision (b) because it failed to indicate that the investigator made the required disclosures to S.M. about the proceedings, or the proper inquiries of S.M. concerning her views about her parents. During the trial, however, appellant's counsel did not challenge the sufficiency of the report and stated that he had no objection to its admission into evidence. Issues not raised at trial usually will not be considered on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 [father forfeited any complaint about the social worker's report in proceeding terminating his parental rights when he failed to object in the trial court].) Even though the application of the forfeiture rule is not mandatory, the California Supreme Court cautioned against lightly excusing a failure to preserve a claim in the trial court: "Although an appellate court's discretion to consider forfeited claims extends to dependency cases [citations], the discretion must be exercised with special care in such matters. 'Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code.' (*In re Chantal S.* (1996) 13 Cal.4th 196, 200 . . . .) Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance. ([Welf. & Inst. Code,]§ 366.26.)" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

Appellant has not persuaded us that the forfeiture rule should not be applied or excused. In any case, appellant has not demonstrated reversible error.

Errors such as the one at issue here may be quantitatively assessed in the context of the evidence to determine prejudice, and are thus not structural defects. (See *In re James F.* (2008) 42 Cal.4th 901, 917.) The fundamental rule in California is that judgments cannot be set aside "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) This is not a case in which the parties' due process rights were violated because they did not receive the report or no investigation was conducted. (Cf. *In re Linda W.* (1989) 209 Cal.App.3d 222, 226–227; *In re George G.* (1977) 68 Cal.App.3d 146, 156–157.) The report was filed and submitted in accordance with statutory requirements; the only flaw was the absence of information relating to S.M.'s views about the proceedings.[8] " 'Deficiencies in an assessment report surely go to the weight of the evidence, and if sufficiently egregious may impair the basis of a court's decision to terminate parental rights,' " but are not prejudicial per se. (*In re Valerie W.* (2008) 162 Cal.App.4th 1, 14.) Reversal is appropriate "only if we conclude '. . . it is reasonably probable that a result more favorable

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[8] To the extent that appellant suggests that the report was flawed because the investigator failed to interview him, we note that section 7851 does not explicitly require the investigation and report to include an interview of the parents. (See *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1380.) In any event, appellant was given a full opportunity to testify as to his version of the events at trial, and to present other evidence, and thus, the court had sufficient information to place the investigative report and its recommendations in context.

to the appealing party would have been reached in the absence of the error.' " (*In re Marriage of Jones* (1998) 60 Cal.App.4th 685, 694.)

Upon review of the record, we find that the error was harmless; noncompliance with section 7851, subdivision (b) did not result in a miscarriage of justice. The purpose of the investigation and report required by the statute is to provide the court with a full understanding of the factual setting of the petition for termination of parental rights. Not only did the mother, stepfather, and appellant testify about the contents of the investigative report, but the information that was omitted from the report—the child's thoughts and views on the proceedings—was presented and considered at trial. The court considered the DCFS report prepared in connection with the petition, and that report indicated that S.M. was aware of the proceedings and was in favor of stepfather adopting her. Furthermore, S.M.'s counsel expressed support for the termination of appellant's parental rights and the adoption petition on S.M.'s behalf.

We find the court possessed sufficient and accurate information concerning the minor, the parents and stepfather in the case. Given this evidence, appellant has not demonstrated that but for the inadequacy of the investigative report he would have obtained a more favorable outcome.

B. *Substantial Evidence Supported the Trial Court's Findings under Section 7822*

Appellant challenges the sufficiency of the evidence to support a finding of abandonment as a basis for terminating his parental rights to S.M. under section 7822.

1. *Applicable law and standard of review*

Section 7822 provides the grounds for terminating parental rights due to a parent's abandonment of his or her child. As relevant here, subdivision (a)(3) of that section provides: "A proceeding under this part may be brought if any of the following occur: [¶] . . . [¶] (3) One parent has left the child in the care and custody of the other parent for a period of one year[**9**] without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child." And subdivision (b) of section 7822 states that the "failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents." (*Ibid*.) This statute is liberally construed "to serve and protect the interests and welfare of the child." (*Id*., at § 7801; see *Adoption of A.B., supra,* 2 Cal.App.5th at p. 919.)

We review the trial court's findings for substantial evidence. (*Adoption of A.B., supra*, 2 Cal.App.5th at p. 922.) In making this determination, we draw all reasonable inferences from the evidence and resolve all evidentiary conflicts in support of the findings and orders of the trial court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court. We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court based on the whole record. (*In re I.J.* (2013) 56 Cal.4th

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9 The required one-year period of abandonment need not be the one year immediately preceding the filing of the petition. (*Adoption of A.B.* (2016) 2 Cal.App.5th 912, 922.)

766, 773.) "The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the findings or order." (*In re R.V.* (2012) 208 Cal.App.4th 837, 843.)

2. *Analysis*

Appellant argues that substantial evidence did not support a finding that he "left" the minor under section 7822 or intended to abandon her through intentional lack of communication or provision for support. Specifically, he asserts that the limits the mother placed on his contact with S.M. and his incarceration rendered him unable to communicate or support his daughter and that those circumstances overcome any presumption that he intended to abandon her.

A parent "leave[s]" a child by voluntarily surrendering the child to another person's care and custody. (*In re Amy A.* (2005) 132 Cal.App.4th 63, 70.) A parent may be found to have "left" a child in another person's care and custody even if they are incarcerated; " 'being incarcerated does not, in and of itself, provide a legal defense to abandonment of children.' " (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1012; *In re Rose G.* (1976) 57 Cal.App.3d 406, 424.) In addition, although a parent will not ordinarily be found to have voluntarily left a child in the care and custody of another where the child is "taken" from the parent by court order, numerous courts have agreed that the "intent to abandon the child" requirement of section 7822 can be established by evidence of a parent's voluntary inaction after an order granting primary care and custody to the other parent. (*Ibid*; see, e.g., *In re Amy A., supra,* 132 Cal.App.4th at p. 70 [parent's "repeated inaction in the face of the custody order provides substantial evidence that he voluntarily surrendered his parental role and thus 'left' [the child] within the meaning of section 7822"];

In re Jacqueline H. (1979) 94 Cal.App.3d 808, 816 ["nonaction of the parent after a judicial decree removing the child may convert a [judicial] 'taking' into a 'leaving' [of a child by the parent"].) Finally, "[i]n determining a parent's intent to abandon, the superior court must objectively measure the parent's conduct, 'consider[ing] not only the number and frequency of his or her efforts to communicate with the child, but the genuineness of' the parent's efforts." (*Adoption of A.B., supra,* 2 Cal.App.5th at p. 923.)

The mother and appellant described appellant's relationship and his support of S.M. differently. According to appellant, he visited S.M. as often as he could when he was not incarcerated and tried to maintain contact with her through letters and telephone contact when he was in jail. He complained that the mother would not allow more visits and claimed that he obtained a modification of the custody order so that he could have overnight visits with his daughter. He also claimed that he provided regular financial support for her.

As the trial court noted, appellant's testimony on the frequency of appellant's visits, the limitations the mother allegedly placed on the visits, and his financial support efforts was vague and non-specific. Finding the mother's account more credible, the court credited her version of events. The court considered her testimony along with the other evidence before it concluded that appellant had abandoned S.M. for the requisite statutory period in section 7822.

The record supports the court's conclusion. The mother provided detailed testimony about the number and duration of appellant's visits. She testified that during his periods of incarceration between 2009 and late 2011 and then again between 2015 and 2018, appellant had sent fewer than five letters and cards to his daughter, had no other contact with her and provided no

financial support to her. The mother presented evidence that when appellant was not in prison, he had about five or six visits annually with his daughter—usually under an hour in length. And that even after the parents returned to the family court in mid-June 2014 to modify the prior custody order and agreed to a "step-up" visitation plan, appellant only participated in short visits for a few months; he never progressed to overnight visits and never sought to modify the plan. Similarly, even though the court had ordered appellant to pay $269 a month in child support in early 2012, appellant did not make any payments until the end of 2012 and then stopped paying after about eight months; he never sought to modify the support order. Indeed, although appellant claimed that he provided consistent financial support for S.M., the uncontroverted evidence presented at trial showed that he provided support irregularly; between 2008 until 2015 appellant had provided approximately $2,600 in support for S.M.

Even if the periods appellant was in prison are not considered, we conclude substantial evidence supports a finding of abandonment under section 7822 for the requisite statutory period. Appellant's contact, visitation and support of S.M. during the periods he was not incarcerated, were token efforts at best. And even after the parties agreed to a formal "step-up" visitation plan in 2014, appellant failed to follow through with it. Every couple of years, when he was out of prison, appellant engaged in short-lived efforts to reconnect with his daughter. Appellant did not overcome the presumption that he intended to abandon his daughter based on his lack of consistent contact and support. In reaching this conclusion, we observe that the "Legislature has determined that a child's need for stability cannot be postponed indefinitely to conform to an absent parent's plans to reestablish contact 'in the distant future.' " (*Adoption of A.B.,*

supra, 2 Cal.App.5th at p. 923; see also *In re Daniel M.* (1993) 16 Cal.App.4th 878, 884 [" 'The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it.' "].)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

JOHNSON, J.

BENDIX, J.